

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1965

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

NO. 74-1965

MODERN HOME INSTITUTE, INC.
ROMAC RESOURCES, INC.

Plaintiffs-Appellants

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY
HARTFORD FIRE INSURANCE CO.
THE AETNA CASUALTY AND SURETY CO.
THE TRAVELERS INSURANCE COMPANY
THE TRAVELERS INDEMNITY CO.
THE CONNECTICUT ASSOCIATION OF
INDEPENDENT INSURANCE AGENTS, INC.

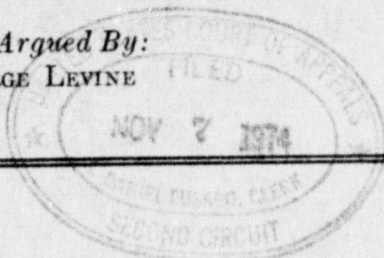
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

**BRIEF OF DEFENDANT-APPELLEE
THE CONNECTICUT ASSOCIATION OF
INDEPENDENT INSURANCE AGENTS, INC.**

To Be Argued By:
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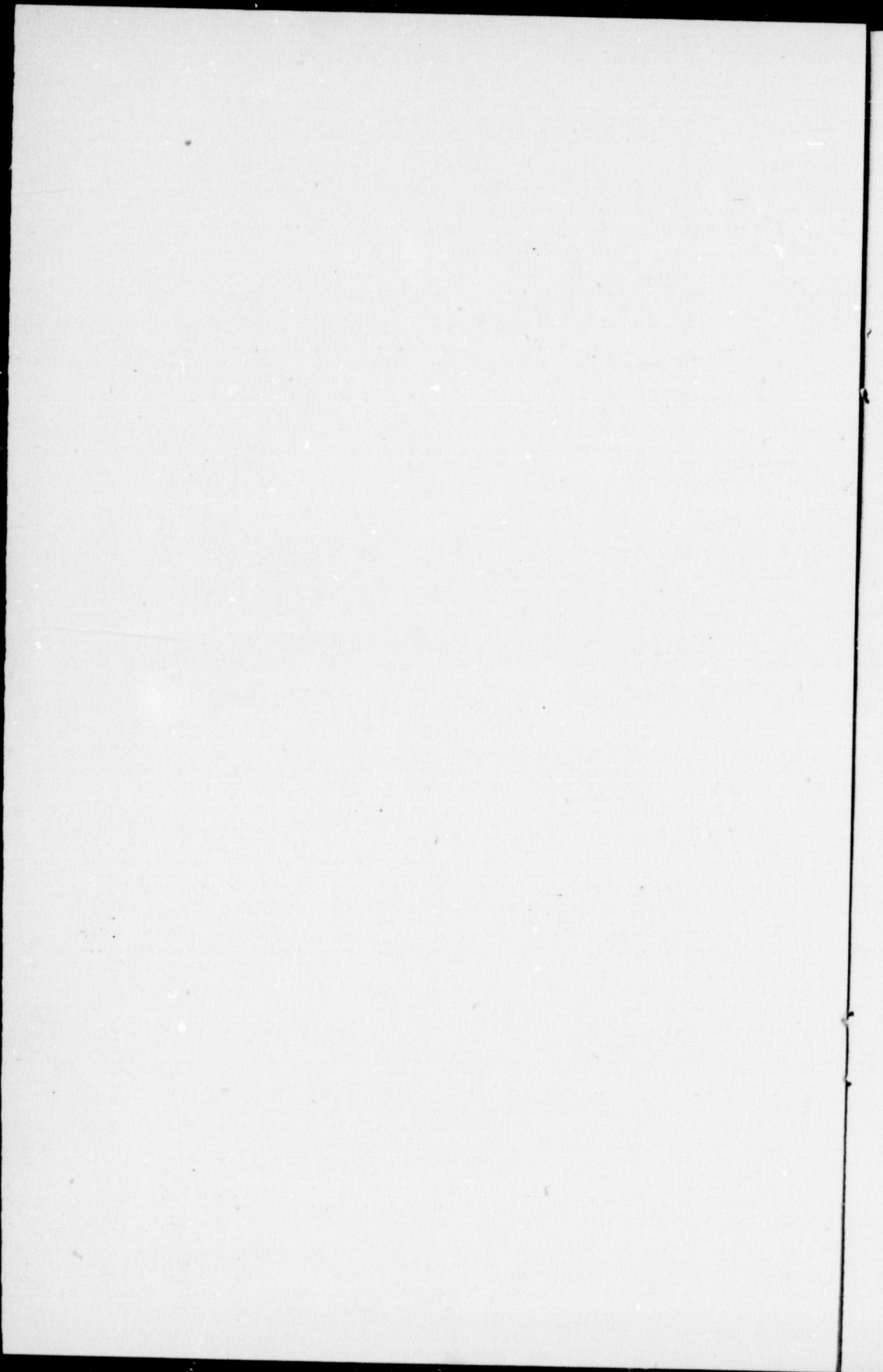


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ISSUE PRESENTED FOR REVIEW

As to this defendant The Connecticut Association of Independent Insurance Agents, Inc. (hereinafter "CAIIA") the issue presented is whether the materials on file, when construed in the light most favorable to the plaintiffs, create a genuine issue of fact as to the plaintiffs' allegation that CAIIA combined and conspired with others, to the injury of the plaintiffs, in violation of Title 15, Section 1 of the United States Code (hereinafter "the Sherman Act").

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Court Below

This is an anti-trust case commenced in 1966 by plaintiffs which had previously been engaged in the business of gathering consumer information from members of the public and selling this information to retailers.

The action was commenced by one plaintiff, Romac Resources, Inc. (hereinafter "Romac") in April, 1966. Seven weeks later the other plaintiff, Modern Home Institute, Inc. (hereinafter "Modern"), the parent of Romac, commenced an identical action against the same defendants. The two cases were consolidated in June, 1966, and in 1971 the plaintiffs filed an Amended Substituted Consolidated Complaint (hereinafter "the Complaint").

There were originally thirteen defendants in the case. However, in 1972 seven defendants, each of which was a "direct writer" of automobile casualty insurance which sold insurance policies through company employees, was dismissed from the case by stipulation. The remaining defendants are five "agency writer" insurance companies (hereinafter "the defendant insurance companies") which sell insurance policies through agents, and CAIIA, a trade association of independent insurance agents who operate in Connecticut.

The Complaint alleges that the plaintiffs were engaged in eliciting from members of the public information as to the dates on which their automobile insurance policies would expire (hereinafter "X dates"), and that the plaintiffs attempted to sell these X dates to the defendant insurance companies. The Complaint alleges that each of the defendant insurance companies rejected the plaintiffs' proposal, and that these rejections were the result of a combination

and conspiracy in restraint of trade among the defendant insurance companies and CAIIA.

In 1973 each of the remaining defendants filed a Motion for Summary Judgment, and these motions were argued before Judge Clarie. Subsequent to the argument on these motions Judge Clarie advised all counsel that he had previously represented one of the defendants as a practitioner. At that time Judge Clarie and all the parties agreed that the case be transferred to Judge Blumenfeld for decisions on the Motions for Summary Judgment.

On June 18, 1974 Judge Blumenfeld ordered that summary judgment be entered in favor of each of the defendants.

B. Facts Relevant to the Issue Presented for Review

The record contains reference to four outside communications relating to X dates which were made by or on behalf of CAIIA which were received by, or might have come to the attention of, non-members of CAIIA. These are:

1. One or two telephone calls concerning X dates from John B. Crosson, the then president of CAIIA, to a representative of the defendant Hartford Fire Insurance Company (which jointly with the defendant Hartford Accident & Indemnity Company is hereinafter "the Hartford") which took place not earlier than June 13, 1962. (Par. 6, 8, Aff. of John B. Crosson [hereinafter "the Crosson Aff."], App. II, Pp. 88aa, 89aa; Ex. N to Aff. of John L. Warden [hereinafter "the Warden Aff."], P. 79aa, App. II; Ex. O to the Warden Aff., P. 80aa, App. II.)

Relevant to the Crosson phone calls to the Hartford is the fact that a decision not to purchase the plaintiffs' product was made by the Hartford at a staff meeting on May 21, 1962 (Ex. B to the Warden Aff., Pp. 66aa, 67aa, App. II) and the fact that this decision not to purchase was communicated to the plaintiffs by letter of May 31, 1962. (Ex. C to the Warden Aff., P. 68aa, App. II.)

2. A meeting between representatives of the defendant The Aetna Casualty & Surety Company (hereinafter "the Aetna") and several Aetna agents, of which Mr. Crosson was one, which took place on July 19, 1962 at which, among other things, X dates were discussed. (Par. 8, 9, Aff. of William W. Ellis [hereinafter "the Ellis Aff."], Pp. 82aa, 83aa, App. II; Ex. B to the Ellis Aff., P. 86aa, App. II; Par. 9, the Crosson Aff., P.89aa, App. II.)

Relevant to the meeting between Mr. Crosson and the Aetna representatives is the fact that the Aetna's decision not to purchase the plaintiffs' product was communicated to the staff of the Aetna's Agency Department on July 16, 1962 (Par. 5, 6, the Ellis Aff., Pp. 81aa, 82aa, App. II) and the fact that this decision not to purchase was communicated to the plaintiffs by letter of July 17, 1962. (Par. 7, the Ellis Aff., P. 82aa, App. II; Ex. A to the Ellis Aff., P. 85aa, App. II.)

3. The issuance of an information bulletin which contained an article concerning X dates, by CAIIA to its members on July 19, 1962 (Par. 10, the Crosson Aff., Pp. 89aa, 90aa, App. II; Ex. B to the Crosson Aff., Pp. 93aa, 94aa, 95aa, 96aa, App. II.)

There were no contacts relating to X dates between CAIIA and the defendants The Travelers Insurance Company and The Travelers Indemnity Company (hereinafter jointly "the Travelers"). (Par. 11, 12, 13, 14, the Crosson Aff., P. 90aa, App. II.) Because there were no contacts between CAIIA and the Travelers concerning X dates, and because the only external publication of CAIIA making reference to X dates which could have come to the attention of the Travelers was the bulletin issued on July 19, 1962, the timing of the decision by the Travelers not to purchase the information offered by the plaintiffs is relevant. By letter of May 18, 1962 the Travelers advised the plaintiffs that it would not purchase their product. (Par. 13,

Affidavit of George D. Brodigan [hereinafter "the Brodigan Aff."], P. 68AAA, App. III.)

4. Conversations by Mr. Crosson with the office of the Connecticut Insurance Commissioner concerning X dates. (Par. 7, the Crosson Aff., Pp. 88aa, 89aa, App. II.)

ARGUMENT

The plaintiffs' claim against CAIIA reduces to two elements:

a. That CAIIA combined or conspired with others, in violation of the Sherman Act, for the purpose of impeding the sale of X dates by the plaintiffs; and

b. That the alleged combination or conspiracy did, in fact, impede the sale of X dates by the plaintiffs.

If, as CAIIA submits, the uncontradicted materials on file establish the non-existence of one or both of these elements, CAIIA is entitled to summary judgment.

The claim of "conscious parallelism" which is set forth in Paragraph 25 of the Complaint (P. 9aa, App. II) is alleged only against "defendant insurance companies". Accordingly, the plaintiff cannot rely upon inference to establish the existence of a conspiracy between CAIIA and one or more of the defendant insurance companies. Rather, in order to get their case to a jury, plaintiffs must offer some evidence that CAIIA combined or conspired with others. Similarly, when the materials filed by the defendant refute the existence of a Sherman Act combination or conspiracy, the plaintiffs must produce evidence which contradicts the defendant's materials in order to survive a Motion for Summary Judgment.

The first step for the plaintiffs in the proof of a combination or conspiracy involving CAIIA is the establishment

of communication between CAIIA and another alleged conspirator. In the context of this case that step requires some proof that CAIIA made contact with non-members of CAIIA in regard to X dates. According to the uncontradicted affidavit of Mr. Crosson, who was at all relevant times the president of CAIIA, direct communications regarding X dates were made by CAIIA to three non-members of CAIIA, and one indirect communication regarding X dates was published by CAIIA. The three direct contacts consisted of one or two telephone calls by Mr. Crosson to the Hartford, a meeting with representatives of the Aetna which Mr. Crosson attended together with several other Aetna agents, none of whom was apparently acting as a representative of CAIIA, and conversations by Mr. Crosson with the office of the Connecticut Insurance Commissioner. The indirect communication consisted of the issuance of an information bulletin making reference to X dates by CAIIA to its members. Paragraphs 12, 13 and 14 of the Crosson Affidavit (P. 90aa, App. II), which are uncontradicted, clearly establish that there were no other communications made by or on behalf of CAIIA in regard to X dates which were either received by, or might have come to the attention of, non-members of CAIIA. Therefore, if CAIIA can establish that none of these communications constitutes evidence of a Sherman Act combination or conspiracy which injured the plaintiffs, CAIIA is entitled to summary judgment.

A. Communications With The Hartford

Paragraph 8 of the Crosson Affidavit (P. 89aa, App. II), which is uncontradicted, states that Mr. Crosson had no contact with the Hartford concerning expiration dates until after he had received from a CAIIA member a copy of a letter, dated June 6, 1962, which the CAIIA member had received from the Hartford. This letter had been sent to agents of the Hartford by Channing Barlow, an officer of

that company, and stated that the Hartford had decided not to purchase expiration dates. (Ex. D to the Warden Aff., P. 69aa, App. II.)

That there was no contact between CAIIA and the Hartford prior to the Hartford's decision not to purchase is corroborated by the uncontradicted deposition of Channing Barlow, in which the following colloquy took place:

"Q. Prior to rejection, did you discuss this matter with any agent or any agency group?

A. No, sir." (P. 4103, App. II.)

Since Mr. Crosson's contact with the Hartford was subsequent to the Hartford's decision not to purchase the plaintiffs' product, Crosson's contacts with the Hartford cannot be construed to be evidence of a conspiracy involving CAIIA which injured the plaintiffs.

B. Communications With The Aetna

Paragraphs 5 and 6 of the Ellis Affidavit (Pp. 81aa, 82aa, App. II), which are uncontradicted, establish that the Aetna decided not to purchase X dates from the plaintiffs on July 16, 1962. By letter of July 17, 1962 Mr. Ellis advised the plaintiffs of that decision. (Pp. 85aa, App. II.)

On July 19, 1962 a luncheon meeting was held at the Aetna home office at which several Aetna officers and local Aetna agents were present. Among the agents was Mr. Crosson. At that meeting the Romac proposition, among other items, was discussed. (Par. 8, the Ellis Aff., P. 82aa, App. II; Par. 9, the Crosson Aff., P. 89aa, App. II.) As established by the deposition of Mr. Ellis (P. 301a, App. I) and the affidavit of Mr. Crosson (Par. 9, 12, 13, 14, the Crosson Aff., Pp. 89aa, 90aa, App. II), the only communications between CAIIA and the Aetna regarding X dates took place at the July 19 meeting. Since the July 19 communications were subsequent to the decision of July 16 by the Aetna not to purchase the plaintiffs' product, those communications

cannot be construed to be evidence of a conspiracy involving CAIIA which injured the plaintiffs.

C. Issuance of the CAIIA Information Bulletin

According to Paragraph 10 of the Crosson Affidavit (Pp. 89aa, 90aa, App. II) the only written communication concerning expiration dates which emanated from CAIIA was the information bulletin of July 19, 1962. (Pp. 93aa, 94aa, 95aa, 96aa, App. II.) The article in that bulletin making reference to X dates set forth:

- a. That the Hartford had refused to purchase expiration dates;
- b. That CAIIA was opposed to the sale of X dates;
- c. That Mr. Crosson had been told by the Connecticut Insurance Department that the solicitation of X date information in Connecticut was illegal unless undertaken by a licensed Connecticut insurance agent; and
- d. That CAIIA members should advise CAIIA of any attempts to solicit X dates from their policyholders so that CAIIA could in turn report this apparently illegal activity to the Connecticut Insurance Department.

The Travelers advised the plaintiffs of its decision not to purchase by letter of May 18, 1962 (Par. B, the Brodigan Aff., Pp. 68AAA, 69AAA, App. III), the Hartford advised the plaintiffs of its decision not to purchase by letter of May 31, 1962 (Ex. C to the Warden Aff., P. 68aa, App. II) and the Aetna advised the plaintiffs of its decision not to purchase by letter of July 17, 1962. (Ex. A to the Ellis Aff., P. 85aa, App. II.) Since the July 19 issuance of the bulletin by CAIIA to its members was subsequent to the decision by each of the defendant insurance companies not to purchase the plaintiffs' product, the issuance of this publication cannot be construed to be evidence of a conspiracy involving CAIIA which injured the plaintiffs.

Not only does the timing of the issuance of the bulletin belie the claim that the bulletin resulted from a Sherman Act combination or conspiracy against the plaintiffs, but the contents of the article referring to X dates also belie this claim. The article set forth that the Connecticut Insurance Department had advised Mr. Crosson that only licensed agents could solicit X dates in Connecticut and that the solicitation of X dates by non-licensed persons would be a violation of State Law. Since the uncontradicted Seventh Paragraph of the Crosson Affidavit (Pp. 88aa, 89aa, App. II) establishes that Mr. Crosson had been advised by the Connecticut Insurance Department that Connecticut law permitted only licensed agents to solicit X dates, the article in question constitutes no more than an accurate report of a newsworthy governmental action which was of concern to CAIIA members. The question of whether the Connecticut Insurance Department was correct in its interpretation of State law is not relevant in this case, because to require a publisher to determine the validity of a governmental action prior to reporting that action would be to restrict greatly First Amendment rights. In the absence of evidence that, at the very least, the statements contained in the article were inaccurate, the theory that issuance of this bulletin subjects CAIIA to Sherman Act liability is untenable.

D. Communications With The Connecticut Insurance Department

Mr. Crosson freely admits that he contacted the office of the Connecticut Insurance Commissioner on behalf of CAIIA to inquire as to whether Connecticut law permitted people who were not licensed Connecticut insurance agents to compile or sell information concerning X dates in Connecticut. (Par. 7, the Crosson Aff., Pp. 88aa, 89aa, App. II.) As the Supreme Court has said, contact of this type with a government official, even if improperly motivated, is clearly protected and beyond the scope of the anti-trust statutes:

"We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S. Ct. 523, 529 (1961).

Were the rule other than as stated in *Noerr*, the fundamental right of the people to petition their government would be impaired. As the Supreme Court pointed out in a subsequent case, the motive of those who attempt to influence public officials does not alter the protected nature of their conduct:

"*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . . Joint efforts to influence public officials do not violate the anti-trust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670, 85 S. Ct. 1585, 1593 (1965).

CAIIA submits that its inquiry to the Connecticut Insurance Commissioner, being within the scope of the *Noerr-Pennington* doctrine, cannot be construed to be evidence of a Sherman Act combination or conspiracy.

E. Summary

In order to establish liability on CAIIA, the plaintiffs must establish that CAIIA combined or conspired with at least one other conspirator with the result that the sale of X dates by the plaintiffs was impeded. Since the claim of "conscious parallelism" is not alleged against CAIIA, the element of a combination or conspiracy requires establishment of communication between CAIIA and another conspirator.

The Crosson Affidavit states that only four external communications were made by CAIIA regarding X dates. Since the plaintiffs have offered no materials to contradict this evidence, CAIIA is entitled to summary judgment if the materials on file establish that none of these four communications constitutes evidence of a Sherman Act combination or conspiracy which impeded the sale of X dates by the plaintiffs.

CAIIA submits that the uncontradicted materials on file clearly establish that the communications between CAIIA and the Hartford and the Aetna took place subsequent to the decision by each of those companies not to purchase the plaintiffs' product. Accordingly, these communications cannot be construed to be evidence of a Sherman Act combination or conspiracy involving CAIIA which impeded the sale of X dates by the plaintiffs.

Because the issuance of the July 19, 1962 information bulletin by CAIIA to its members was subsequent to the decision of the Hartford, the Aetna and the Travelers not to purchase, and since the information carried in this bulletin was protected by the First Amendment, the issuance of this bulletin cannot be construed to be evidence of a Sherman Act combination or conspiracy which impeded the sale of X dates by the plaintiffs.

Since the communications with the office of the Connecticut Insurance Commissioner were protected communications to the executive branch of government, and as such were shielded by *Noerr-Pennington*, these communications cannot be construed to be evidence of a Sherman Act combination or conspiracy.

CONCLUSION

Because the materials filed by the defendants demonstrate that CAIIA did not combine or conspire, in violation of the Sherman Act, to the injury of the plaintiffs, and since



the plaintiffs have offered no materials which create a genuine issue of fact by contradicting the defendants' materials, CAIA submits that it is entitled to summary judgment and prays that the order of the District Court be affirmed.

DEFENDANT—THE CONNECTICUT ASSOCIATION
OF INDEPENDENT INSURANCE AGENTS

BY GEORGE LEVINE

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UNITED STATES COURT OF APPEALS

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Plaintiffs

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COMPANY, HARTFORD FIRE INSURANCE
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CO., THE TRAVELERS INSURANCE
COMPANY, THE TRAVELERS INDEMNITY
CO., THE CONNECTICUT ASSOCIATION
OF INDEPENDENT INSURANCE AGENTS, INC.
Defendants

CERTIFICATION

OF SERVICE

NOVEMBER 6, 1974

This is to certify that I have this day mailed two
copies of the BRIEF OF DEFENDANT-APPELLEE THE CONNECTICUT
ASSOCIATION OF INDEPENDENT INSURANCE AGENTS, INC. to the
following:

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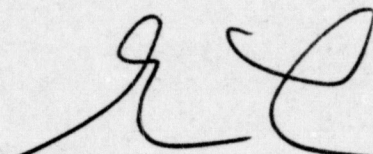
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